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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HUMBERTO PALMA, Plaintiff, vs. CAROLYN W. COLVIN, Acting Commissioner of Social Security,[1] Defendant.	Case No. CV 12-9123-JPR MEMORANDUM OPINION AND ORDER AFFIRMING THE COMMISSIONER

I. PROCEEDINGS

Plaintiff seeks review of the Commissioner's final decision denying his application for Social Security disability insurance benefits ("DIB") and supplemental security income benefits ("SSI"). The parties consented to the jurisdiction of the undersigned U.S. Magistrate Judge pursuant to 28 U.S.C. § 636(c). This matter is before the Court on the parties' Joint Stipulation, filed August 30, 2013, which the Court has taken

[1] On February 14, 2013, Colvin became the Acting Commissioner of Social Security. Pursuant to Federal Rule of Civil Procedure 25(d), the Court therefore substitutes Colvin for Michael J. Astrue as the proper Respondent.

under submission without oral argument.[2] For the reasons discussed below, the Commissioner's decision is affirmed and this action is dismissed.

II. BACKGROUND

Plaintiff was born on January 12, 1959. (AR 169, 173.) He completed high school. (AR 204.) Plaintiff's previous work was collecting and recycling scrap metal, glass, cans, and plastic bottles. (AR 56-57, 200, 209-10.)

On March 31, 2008, Plaintiff filed applications for DIB and SSI. (AR 85-86, 169-77.) He alleged that he had been unable to work since March 18, 2008, because of "[o]pen heart surgery, high cholesterol, high blood pressure, [and] diabetes." (AR 199.) After Plaintiff's applications were denied, he requested a hearing before an Administrative Law Judge. (AR 96.)

A hearing was held on May 12, 2010, at which Plaintiff, who was represented by counsel, testified, as did a vocational expert ("VE").[3] (AR 52-78.) In a written decision issued August 10, 2010, the ALJ determined that Plaintiff was not disabled. (AR 30-38.) On August 8, 2012, the Appeals Council denied review.

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[2] Throughout the joint stipulation, Plaintiff's counsel refers to Plaintiff by different wrong names and the wrong gender. (See, e.g., J. Stip. at 4, 7, 11 (referring to Plaintiff as "Ms. Palma"), 5 (twice referring to Plaintiff as "Jessie Aguirre"), 9 (referring to Plaintiff as "Ms. Mendez" and "Ms. Aguirre").) Such sloppiness does not instill confidence in counsel's arguments. The Court has endeavored, however, not to factor the presentation of the joint stipulation into its analysis.

[3] A hearing was first held on January 19, 2010, but the ALJ ended it without taking any testimony after Plaintiff requested a postponement so he could obtain counsel. (AR 79-84.)

(AR 7-9.) This action followed.

III. STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), a district court may review the Commissioner's decision to deny benefits. The ALJ's findings and decision should be upheld if they are free of legal error and supported by substantial evidence based on the record as a whole. § 405(g); Richardson v. Perales, 402 U.S. 389, 401, 91 S. Ct. 1420, 1427, 28 L. Ed. 2d 842 (1971); Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). Substantial evidence means such evidence as a reasonable person might accept as adequate to support a conclusion. Richardson, 402 U.S. at 401; Lingenfelter v. Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007). It is more than a scintilla but less than a preponderance. Lingenfelter, 504 F.3d at 1035 (citing Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006)). To determine whether substantial evidence supports a finding, the reviewing court "must review the administrative record as a whole, weighing both the evidence that supports and the evidence that detracts from the Commissioner's conclusion." Reddick v. Chater, 157 F.3d 715, 720 (9th Cir. 1996). "If the evidence can reasonably support either affirming or reversing," the reviewing court "may not substitute its judgment" for that of the Commissioner. Id. at 720-21.

IV. THE EVALUATION OF DISABILITY

People are "disabled" for purposes of receiving Social Security benefits if they are unable to engage in any substantial gainful activity owing to a physical or mental impairment that is expected to result in death or which has lasted, or is expected to last, for a continuous period of at least 12 months. 42

U.S.C. § 423(d)(1)(A); Drouin v. Sullivan, 966 F.2d 1255, 1257 (9th Cir. 1992).

A. The Five-Step Evaluation Process

The ALJ follows a five-step sequential evaluation process in assessing whether a claimant is disabled. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4); Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995) (as amended Apr. 9, 1996). In the first step, the Commissioner must determine whether the claimant is currently engaged in substantial gainful activity; if so, the claimant is not disabled and the claim must be denied. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If the claimant is not engaged in substantial gainful activity, the second step requires the Commissioner to determine whether the claimant has a "severe" impairment or combination of impairments significantly limiting his ability to do basic work activities; if not, a finding of not disabled is made and the claim must be denied. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the claimant has a "severe" impairment or combination of impairments, the third step requires the Commissioner to determine whether the impairment or combination of impairments meets or equals an impairment in the Listing of Impairments ("Listing") set forth at 20 C.F.R., Part 404, Subpart P, Appendix 1; if so, disability is conclusively presumed and benefits are awarded. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the claimant's impairment or combination of impairments does not meet or equal an impairment in the Listing, the fourth step requires the Commissioner to determine whether the claimant has sufficient residual functional capacity

("RFC")[4] to perform his past work; if so, the claimant is not disabled and the claim must be denied. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). The claimant has the burden of proving that he is unable to perform past relevant work. Drouin, 966 F.2d at 1257. If the claimant meets that burden, a prima facie case of disability is established. Id. If that happens or if the claimant has no past relevant work, the Commissioner then bears the burden of establishing that the claimant is not disabled because he can perform other substantial gainful work available in the national economy. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). That determination comprises the fifth and final step in the sequential analysis. §§ 404.1520, 416.920; Lester, 81 F.3d at 828 n.5; Drouin, 966 F.2d at 1257.

B. The ALJ's Application of the Five-Step Process

At step one, the ALJ found that Plaintiff had not engaged in any substantial gainful activity since March 18, 2008. (AR 32.) At step two, the ALJ concluded that Plaintiff had the severe impairments of "coronary artery disease (status post bypass) and diabetes mellitus." (Id.) At step three, the ALJ determined that Plaintiff's impairments did not meet or equal any of the impairments in the Listing. (AR 33.) At step four, the ALJ found that Plaintiff had the RFC to perform the "full range" of

[4] RFC is what a claimant can do despite existing exertional and nonexertional limitations. 20 C.F.R. §§ 404.1545, 416.945; see Cooper v. Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989).

light work.[5] (AR 34-37.) Based on the VE's testimony, the ALJ concluded that Plaintiff was able to perform his past relevant work as a "laborer, salvage," DOT 929.687-022, 1991 WL 688172, as generally and actually performed. (AR 37.) Accordingly, the ALJ determined that Plaintiff was not disabled. (AR 37-38.)

V. DISCUSSION

Plaintiff contends that the ALJ erred in (1) finding that his previous job was "past relevant work" and (2) determining that he could perform his past relevant work as actually and generally performed. (J. Stip. at 4-11.)

A. Background

In an undated disability report, Plaintiff stated that from 2002 to June 2007, he was self-employed as a "recycler," "collect[ing] cans and plastic bottles and recycl[ing]" them. (AR 200.) In that job, he had to lift and carry "plastic bags with bottles and cans"; he lifted 10 pounds "frequently," which was defined as "from 1/3 to 2/3 of the workday," and 50 pounds at most. (Id.) Plaintiff stated that he used "machines, tools, or equipment" and "technical knowledge or skills" as part of his job and that he stopped working in June 2007 because he "did not have

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[5] "Light work" involves "lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds." 20 C.F.R. §§ 404.1567(b), 416.967(b). The regulations further specify that "[e]ven though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls." Id. A person capable of light work is also capable of "sedentary work," which involves lifting "no more than 10 pounds at a time and occasionally lifting or carrying [small articles]" and may involve occasional walking or standing. §§ 404.1567(a)-(b); 416.967(a)-(b).

the necessary transportation to continue the job." (AR 199.) Plaintiff stated that he worked eight hours a day, five days a week, and earned $240 a month. (AR 200.)

On April 28, 2008, Plaintiff's daughter, Mirza Palma, completed a work-history report stating that Plaintiff had worked as a "junk collector" from 2002 to 2007. (AR 209-16.) Palma wrote that in that job, Plaintiff lifted "6 f[oot] metal pieces," cans, and plastics and used "machines, tools, or equipment" and "technical knowledge or skills." (AR 210.) She checked boxes indicating that Plaintiff "frequently" lifted "50 [pounds] or more" and that the heaviest weight he lifted was "50 [pounds]." (Id.) Palma stated that Plaintiff worked 10 to 12 hours a day, six days a week, and earned $50 a day. (Id.) A Social Security earnings summary dated June 30, 2009, showed that Plaintiff earned $1954 in 2002, $10,547 in 2003, $10,898 in 2004, $11,632 in 2005, and $8035 in 2006. (AR 178.)

At the May 12, 2010 hearing, Plaintiff testified that his past work involved "go[ing] into the trash cans before the trash can was empt[ied]" and finding plastic, glass, and aluminum to recycle. (AR 57.) Plaintiff testified that the most he would lift would be a bag of recyclable material weighing about 12 pounds; he said he could not lift more than that because "[a]ll of my life I've always had back problems." (AR 57-58.) After the materials were collected, Plaintiff's friend, who had a van, took them to a recycling plant, and he and Plaintiff split the money he received. (AR 57, 73.) When questioned by the VE, Plaintiff confirmed that he did not participate in the loading or unloading of materials. (AR 73.)

The VE testified that Plaintiff had previously worked as a "laborer, salvage," which carried a DOT code of 929.687-022 and was "generally regarded as a medium exertional level job" with a specific vocational preparation level of two.[6] (AR 74.) The VE further testified that someone of Plaintiff's age with his education and vocational history and who could perform a "full range" of light work would be able to perform the laborer job as Plaintiff actually performed it but not "as classified," presumably referring to the DOT description. (Id.)

In his decision, the ALJ found that Plaintiff retained the RFC to perform a "full range" of light work. (AR 34.) The ALJ found that Plaintiff could perform his past relevant work as a "laborer, salvage," DOT 929.687-022, 1991 WL 688172, which the ALJ noted was "medium" work but "performed at light." (AR 37.) The ALJ found that "[t]estimony from both [Plaintiff] and the [VE] provide persuasive evidence that [Plaintiff] performed his past relevant work at a light exertional level which falls within the parameters of his [RFC]." (Id.) The ALJ also stated, somewhat contradictorily and without elaboration, that Plaintiff could perform the laborer job "as generally performed" even though it was medium exertion. (Id.) The ALJ concluded that Plaintiff was not disabled and denied his claims for benefits. (AR 37-38.)

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[6] An SVP of two "corresponds precisely to the definition of unskilled work embodied in SSA regulations." Terry v. Sullivan, 903 F.2d 1273, 1276 (9th Cir. 1990).

B. Past Relevant Work

Plaintiff contends reversal is required because it is "unclear whether the ALJ completed the proper analysis" in determining that Plaintiff had "past relevant work." (J. Stip. at 7.) Petitioner further contends that because he was a "self employed person," the ALJ was required to deduct his "normal business expenses" from his income before determining whether his work as a salvage laborer constituted "substantial gainful work activity." (J. Stip. at 9-10.)

A job qualifies as past relevant work only if it involved substantial gainful activity. Lewis v. Apfel, 236 F.3d 503, 515 (9th Cir. 2001); 20 C.F.R. §§ 404.1560(b)(1) (defining past relevant work), 416.960(b)(1) (same). Substantial gainful activity is work activity that "involves doing significant physical or mental activities" and "is the kind of work usually done for pay or profit, whether or not a profit is realized." §§ 404.1572(a)-(b), 416.972(a)-(b). "Earnings can be a presumptive, but not conclusive, sign of whether a job is substantial gainful activity." Lewis, 236 F.3d at 515; see also §§ 404.1574(b) (defining earnings that will ordinarily show that claimant engaged in substantial gainful activity), 416.974(b) (same); see also SSR 83-34, 1983 WL 31256, at *2 (Jan. 1, 1983) ("The receipt of substantial income by the operator of a one-person business will result in a finding of [substantial gainful activity]."). Thus, if a person's earnings exceed certain amounts set forth in the regulations, he is ordinarily considered to have engaged in substantial gainful activity. See §§ 404.1574(b), 416.974(b). Before determining whether a self-

employed person's earnings rise to that level, however, the ALJ must first deduct "normal business expenses," among other things, from the gross earnings.[7] §§ 404.1575(a)(2), (c)(1), 416.975(a)(2), (c)(1); accord SSR 83-34, 1983 WL 31256, at *4.

Plaintiff does not dispute that his income while working as a salvage laborer exceeded amounts generally considered to indicate substantial gainful activity.[8] Rather, Plaintiff argues that because he was a "self employed person," the ALJ was required to deduct his "normal business expenses" from his income before determining whether his work as a salvage laborer constituted "substantial gainful work activity." (J. Stip. at 9-10.) Plaintiff contends that reversal is appropriate because it is "unclear" whether the ALJ performed that analysis. (Id. at 7.)

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[7] If a self-employed person's net earnings do not rise to the level set forth in the regulations, the Social Security Administration applies two other tests to determine whether the person engaged in substantial gainful activity. See §§ 404.1575(a)(2), 416.975(a)(2). One test assesses whether the person's "work activity, in terms of factors such as hours, skills, energy output, efficiency, duties, and responsibilities, is comparable to that of unimpaired individuals in your community who are in the same or similar businesses as their means of livelihood"; the other assesses whether the work activity is worth an amount ordinarily considered to be substantial gainful activity "when considered in terms of its value to the business, or when compared to the salary that an owner would pay to an employee to do the work you are doing." Id.

[8] A person who earned more than $800 a month in 2003, $810 a month in 2004, or $830 a month in 2005 is ordinarily considered to have engaged in substantial gainful activity. See Substantial Gainful Activity, Social Security, http://www.ssa.gov/oact/cola/sga.html (last accessed Dec. 10, 2013). Plaintiff earned $878 a month in 2003, $908 a month in 2004, and $969 a month in 2005. (See AR 178.)

During the administrative proceedings, however, Plaintiff – who was represented by counsel at the hearing and before the Appeals Council (see AR 15-16, 52, 131-32, 163-65) – never asserted that he had incurred any business expenses in connection with his work as a salvage laborer, nor did he submit any evidence of such expenses. Indeed, although Plaintiff presumably used transportation in his work (see, e.g., AR 554 (medical record noting that Plaintiff "[r]ecycle[d] cans but stopped when car broke down")), Petitioner in fact testified that the friend with whom he worked "had a van" and that his friend would take the recyclables to the recycling plant (AR 57, 73). Thus, nothing indicates that Plaintiff incurred transportation expenses. Indeed, Plaintiff still does not point to any specific business expense that the ALJ failed to deduct from his earnings; instead, he contends only that reversal is required because the ALJ "did not perform the required analysis." (J. Stip. at 10.) Because nothing indicates that Plaintiff incurred any business expenses, the ALJ's failure to explicitly address the issue was at most harmless error. See Molina v. Astrue, 674 F.3d 1104, 1115 (9th Cir. 2012) (ALJ's error harmless when "inconsequential to the ultimate nondisability determination" (internal quotation marks omitted)); Stout v. Comm'r, Soc. Sec. Admin., 454 F.3d 1050, 1055 (9th Cir. 2006) (same). Plaintiff is not entitled to remand on this ground.

C. Ability to Perform Past Relevant Work

Plaintiff contends that he "does not have the requisite lifting abilities to perform the past relevant work" as a salvage laborer because that work "as he actually performed it required

him to lift up to 50 pounds." (J. Stip. at 7-8.) Plaintiff argues that the ALJ limited him to "light work, i.e., work that requires lifting 20 pounds occasionally and 10 pounds frequently" and "offered no explanation how an individual who is limited to those weights can perform the past work where, as performed, it required lifting of up to 50 pounds." (Id. at 8.)

A plaintiff has the burden of proving that his alleged physical or mental impairments prevented him from engaging in his past relevant work, either as he actually performed it or as it is customarily performed in the national economy. See Vertigan v. Halter, 260 F.3d 1044, 1051 (9th Cir. 2001); Orteza v. Shalala, 50 F.3d 748, 751 (9th Cir. 1995) (holding that plaintiff has burden to prove inability to return to former type of work, not just former job). "To determine whether a claimant has the residual capacity to perform his past relevant work, the [ALJ] must ascertain the demands of the claimant's former work and then compare the demands with his present capacity." Villa v. Heckler, 797 F.2d 794, 797-98 (9th Cir. 1986). Although the burden lies with the plaintiff at step four, the ALJ still has a duty to make the requisite factual findings to support his conclusions. Pinto v. Massanari, 249 F.3d 840, 845 (9th Cir. 2001). Once an ALJ determines that the plaintiff's limitations do not preclude the work as actually performed, the ALJ need not conclude that he can also return to his prior position as customarily performed in the general economy. See id. ("We have never required explicit findings at step four regarding a claimant's past relevant work both as generally performed and as actually performed." (emphasis in original)).

The best source of how a job is generally performed is usually the Dictionary of Occupational Titles ("DOT"). Id. at 845-46; see also Massachi v. Astrue, 486 F.3d 1149, 1153 (9th Cir. 2007) ("In making disability determinations, the [SSA] relies primarily on the [DOT] for information about the requirements of work in the national economy." (internal quotation marks omitted)). The DOT describes the position of salvage laborer as collecting "reusable items or waste materials" in containers and inspecting and sorting materials, among other things. DOT 929.687-022, 1991 WL 688172. It is categorized as "[m]edium [w]ork."[9] Id.

Plaintiff argues that the requirements of his past relevant work as he actually performed it exceed his RFC for light work because, as stated in his two disability reports, he lifted a maximum of 50 pounds when working as a salvage laborer. (J. Stip. at 7-8 (citing AR 200, 210).) One of those two reports, however, was completed by Plaintiff's daughter, not Plaintiff (AR 209-16), and the ALJ explicitly found her to be only partially credible (AR 36-37), a finding that Plaintiff has not challenged or even addressed. Moreover, although Plaintiff's own disability report states that the heaviest weight he lifted was 50 pounds (AR 200), at the hearing Plaintiff testified that the heaviest item he lifted was a bag of recyclable materials weighing 12

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[9] Social Security regulations state that "medium work" involves "lifting no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds." §§ 404.1567(c), 416.967(c). The Social Security Administration has specified that its exertional classifications "have the same meaning as they have in the exertional classifications noted in the DOT." SSR 00-4p, 2000 WL 1898704, at *3 (Dec. 4, 2000).

pounds; in fact, he claimed that he had always been physically unable to lift more than that because of his lifelong "back problems." (AR 57-58.) In the joint stipulation, Plaintiff does not specifically address his testimony that he never lifted more than 12 pounds in his previous work but instead merely states, without further elaboration, that "[w]hile [his] hearing testimony was unclear, the vocational reports are not." (J. Stip. at 8.)

The ALJ, however, permissibly credited Plaintiff's testimony at the hearing instead of his statements in the disability report. Contrary to Plaintiff's argument, his testimony at the hearing was not "unclear"; rather, he sufficiently explained his past work, including the lifting requirements, in response to the ALJ's and VE's questions. (See AR 56-58, 73.) In his decision, moreover, the ALJ specifically stated that "[t]estimony from . . . the claimant . . . provide[d] persuasive evidence that [he] performed his past relevant work at a light exertional level." (AR 37.) Thus, the ALJ sufficiently indicated that he was crediting Plaintiff's testimony regarding the requirements of his past relevant work. See SSR 82-62, 1982 WL 31386, at *4 (Jan. 1, 1982) (decision that individual has "capacity to perform a past relevant job" must include "finding of fact as to the physical and mental demands of the past job/occupation").

Moreover, the ALJ was entitled to reject Plaintiff's statement in his disability report that he lifted a maximum of 50 pounds while working as a salvage laborer. Elsewhere in his decision, the ALJ persuasively discounted Plaintiff's credibility – a finding that Plaintiff does not challenge – based on the lack

of objective medical evidence supporting his complaints, his generally conservative treatment, his noncompliance with treatment recommendations, and several inconsistencies among his various statements. (AR 34-36.) Indeed, the disability reports Plaintiff relies upon are themselves contradictory: in one Plaintiff wrote that in his past work he "frequently" lifted 10 pounds and earned $240 a month (AR 200) and in the other his daughter wrote that Plaintiff frequently lifted "50 [pounds] or more," worked six days a week, and earned $50 a day (AR 210). Given Plaintiff's overall lack of credibility, the ALJ permissibly credited his hearing testimony rather than the contradictory statements in his disability report in determining the requirements of his past work. Because Plaintiff therefore failed to carry his burden of proving that he was unable to perform his past relevant work, see Pinto, 249 F.3d at 844, he is not entitled to remand on this ground.[10]

[10] The ALJ appears to have erred in finding that Plaintiff could perform his past relevant work as "generally performed." (See AR 37.) As noted, the DOT states that the salvage laborer job was medium work, DOT 929.687-022, 1991 WL 688172, which exceeded Plaintiff's RFC for a full range of light work (AR 34). But that error was harmless because, as discussed above, the ALJ permissibly found that Plaintiff could perform his past relevant work as he actually performed it. See Molina, 674 F.3d at 1115; Stout, 454 F.3d at 1055; cf. Tweedy v. Astrue, 460 F. App'x 659, 661 (9th Cir. 2011) (declining to address whether claimant could perform past relevant work as generally performed when ALJ correctly concluded that claimant could perform it as actually performed).

VI. CONCLUSION

Consistent with the foregoing and pursuant to sentence four of 42 U.S.C. § 405(g),[11] IT IS ORDERED that judgment be entered AFFIRMING the decision of the Commissioner and dismissing this action with prejudice. IT IS FURTHER ORDERED that the Clerk serve copies of this Order and the Judgment on counsel for both parties.

DATED: December 19, 2013

JEAN ROSENBLUTH
U.S. Magistrate Judge

[11] This sentence provides: "The [district] court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing."